

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the  
Denial of the Day Care  
License of Gail M. Gertken

FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick at 9:00 a.m. on December 15, 1989, at the Office of Stearns County Social Services, 700 Mall Germain, St. Cloud, Minnesota. That hearing was held pursuant to a Notice of and Order for Hearing dated October 6, 1989. The record closed on December 15, 1989, upon adjournment of the hearing.

Beverly Webb, Social Services Supervisor, Stearns County Social Services, Box 1107, St. Cloud, Minnesota 56302 appeared on behalf of Stearns County Social Services (the Local Agency). Gail M. Gertken, 305 3rd Street Southwest Richmond, Minnesota 56368 (the Applicant) appeared pro se.

This report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Human Services will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this report has been made available to the parties to the proceeding for at least 10 days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Ann Wynia, Commissioner, Department of Human Services, 200 Human Services Building, 444 Lafayette Road, St. Paul, Minnesota 55155-3815, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue in this proceeding is whether the application of Applicant for a family day care license should be denied under Minn. Rules pt. 9502.0335, subp. 6A. The preliminary denial of the application, alleged that Applicant's husband Michael was alcoholic dependent in an episodic fashion and periodically abusive of other mood altering chemicals, that Applicant and her husband denied any need for intervention and did not consider Michael's alcohol use to be problematic, and "for these reasons, your license application has been denied."

Based upon the record herein, the Administrative Law Judge makes the

following:

FINDINGS OF FACT

1. The Applicant was born June 9, 1965. She is married to Michael Gertken. Mr. Gertken was born February 2, 1962, and works at Cold Spring Granite Company. He is doing very well on his job and was recently made the

night shift supervisor. He is regarded as mature and responsible by his employer. The Gertkens have been married for something over two years and have three children

2. Applicant has provided unlicensed child day care in her home for about one and one-half years. She applied for a license to provide family day care, apparently some time in early 1989. The application was assigned to Amy Rasmussen, Social Work Licensor, Stearns County Social Services for assessment. During the course of that assessment, Ms. Rasmussen received a report from the Stearns County Sheriff's Office that Mr. Gertken had two 1985 DWIs on his record. Ex. E. Because of the DWIs, the Local Agency required a chemical dependency evaluation of Mr. Gertken. Based on the results of that evaluation, Ex. H, the Local Agency recommended denial of the license application. Ex. C. Based upon the recommendation, the Department of Human Services denied the application. Ex. D.

3. Except for Mr. Gertken's chemical dependency problem referred to above and described in more detail below, the Local Agency would have granted a license to Applicant. Ms. Rasmussen completed the assessment and found that all other requirements had been fulfilled. The chemical dependency problem at issue in this matter is the only reason the license was not issued.

4. Mr. Gertken was evaluated by Joan Vincent, who has a Bachelors of Elective Studies degree and completed a chemical dependency certificate program. At the time she did the evaluation of Mr. Gertken, she was a Certified Chemical Dependency Practitioner with the Central Minnesota Mental Health Center. She conducted interviews of Mr. Gertken and Applicant and administered two tests. It is her impression that Mr. Gertken is chemically dependent and currently in a period of controlled use. She also felt that it was probable that he was minimizing, denying and rationalizing the quantity and frequency of his use of chemicals. Ex. H. She testified at the hearing that, while it was not her role to make such a determination, she felt that Mr. Gertken's chemical use possibly could negatively affect the day care provided by Applicant.

5. Mr. Gertken was an occasional heavy drinker, at least during his early twenties. He described himself as "going on a bender now and then," especially on special occasions such as birthdays and weddings. He thought it was not particularly unusual to "get hammered on your birthday." His first DWI occurred on his birthday, February 2, 1985. The second occurred on Applicant's birthday, June 9, 1985. Mr. Gertken stated at the hearing that he had used cocaine perhaps a half a dozen times up until some time after he and Applicant were married. He rationalized that use by saying that he never bought cocaine,

but that a friend would have it at some special occasion such as a wedding, and since it was there, he would use it. Mr. Gertken had not originally admitted to cocaine use to Ms. Vincent during his interviews with her, but told her that he had tried marijuana on one occasion. Ex. H. In the subsequent interview with Ms. Vincent, they discussed the matter.

6. Mr. Gertken does not feel that he is an alcoholic and feels that he has grown up a lot since getting married. He hasn't used any drugs other than alcohol for over a year and a half and has greatly reduced his drinking of alcohol. He still drinks at special events such as weddings and has a few

beers at ball games, but does not do much other drinking and seldom has a drink at home. He has abstained from use altogether since some time in September when Ms. Rasmussen informed the Gertkens that she was recommending denial of the license. Applicant voluntarily entered a treatment program for his alcohol abuse at the time of his second DWI upon advise of his attorney, because it was likely he would be sentenced to a treatment program anyway. He attended one month of daily treatment sessions and then sixteen weeks of aftercare meeting once a week. He successfully completed that program.

7. Applicant is of the opinion that her husband's drinking is no longer a problem and that it had caused no significant problems for over a year. She was also of the opinion that the two of them had matured considerably since being married.

8. Ms. Vincent was of the opinion that the denial by the Gertken's that there was a current problem with Mr. Gertken's chemical dependency was indicative of the chemical dependency being an active process and still ongoing today.

9. Mr. Gertken's use of controlled substances or alcohol has not had a negative effect on Applicant's ability to give care in the past and has not been apparent during the hours she has had children in her care. He has not used drugs other than alcohol since Applicant has been providing unlicensed child care and his use of alcohol is mostly restricted to weekend and evening events. He does not drink around the house, particularly when the children are present. Mr. Gertken has been very good with his own children and with the children for whom Applicant has been providing day care. Applicant presented four letters from parents of children for whom she has provided day care, two of which specifically commented on Mr. Gertken's behavior with their children. One letter, from Vickie and Alan Ruegemer was particularly relevant on this point and stated, in part:

Our son enjoys spending time with Gail's husband Mike. We have watched him play with the children and help Gail with her day care. If anything, we feel that Mike Gertken should be commended for the quality time he spends with these children. My husband and I have been actively involved with Alcoholics Anonymous and ALANON for the last two and a half years. Therefore, we are very concerned about someone taking care of our children who has an alcohol problem. However, after observing Mike both while he is with the children and socially, we

do not feel that there is any valid reason for Gail to be denied her license because his past or present alcohol use.

Our children have been involved with three different licensed and unlicensed day care providers prior to Gail . . . . .

We certainly hope that we will not be forced to use less qualified individuals to take care of our children,

and would be extremely upset if we were forced to change day care providers at this time as our son has never been happier or had better care.

The other letter writers also refer to the high quality of day care provided by Applicant. Amy Rasmussen testified that the references that she received regarding Applicant were "just excellent, probably better than most."

10. At the hearing, Beverly Webb, the Social Services Supervisor for Stearns County Social Services, suggested that the County would be willing to consider a provisional license for the Applicant that would be dependent upon Mr. Gertken receiving some further chemical dependency counseling of some sort and demonstrating proof of abstinence. Such proof would probably have to be in the form of regular verification of an active AA sponsor that he was actively attending AA and involved in some kind of aftercare treatment program. The Gertken's were willing to consider such a program, but were concerned about the cost of treatment since Mr. Gertken had been informed that his insurance policy only covered one treatment program and that had already been used in 1985. They were also concerned that participating in treatment might have some sort of negative impact upon his job. Mr. Gertken stated that he did not particularly want to state that he would abstain from alcohol forever, but that if it was required for his wife's license, he would abstain for twelve months. Ms. Vincent was of the opinion that some sort of counseling less than daily treatment was viable, but suggested that it would be more appropriate for the Gertkens to obtain some family counseling from the Central Minnesota Mental Health Center, and particularly from an individual there who was familiar with their case, to determine what their needs really were. At the adjournment of the hearing, the Gertken's were going to look into that possibility and consider it. Ms. Webb informed the Administrative Law Judge on January 11, 1990, that the Gertkens had made an appointment with the Central Minnesota Mental Health Center for such an evaluation.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction in this matter pursuant to Minn. Stat. 14.50 and 245A.08.

2. The Notice and Order for hearing was proper in all respects and the Department has complied with all relevant substantive and procedural requirements of law and rule.

3. Under Minn. Stat. 245A.08, subd. 3(b) the Applicant bears the burden of proof to demonstrate by a preponderance of the evidence that she has complied fully with the Human Services Licensing Act and other applicable laws and rules and that the application should be approved and a license granted. In this case, the Local Agency has stipulated that Applicant has complied fully with all requirements except with regard to the question of Mr. Gertken's possible chemical dependency.



4. As far as is relevant here, Minn. Rules 9502.0335, subp. 6A, provides that an Applicant should not be issued a license if the Applicant or any other person living in the day care residence or present during the hours children are in care uses controlled substances or alcohol to the extent that the use may have a negative effect on the ability of the provider to give care or is apparent during the hours children are in care. The provision goes on to state that "caregivers" who have been dependent on controlled substances or alcohol such that the use, abuse or dependency has had a negative effect on the ability to give care, was apparent during the hours children are in care, or required treatment or therapy, must have twelve months of verified abstinence before licensure.

5. A "caregiver" is defined in Minn. Rule. 9502.0315, subp. 6 as the provider, substitute, helper or another adult giving care in the residence.

6. Mr. Gertken is not a "caregiver" as that term is defined. His contact with the children is occasional and not a designed part of the care provided by his wife.

7. Mr. Gertken is a person living in the day care resident and will be present during some of the hours children will be in care.

8. Mr. Gertken is chemically dependent, but currently in a period of controlled use. It is not clear whether he can satisfactorily continue at a level of controlled use without problems or adverse consequences.

9. Mr. Gertken's use of controlled substances and alcohol has not and will not have a negative effect on the ability of the Applicant to give care and has not been and will not be apparent during the hours children have been and will be in care.

10. Applicant is not disqualified under the terms of Minn. Rules pt. 9502.0335, subp. 6a.

11. If Mr. Gertken were considered a "caregiver", Applicant would be disqualified under the terms of Minn. Rules pt. 9502.0335, because Mr. Gertken

has been chemically dependent and required treatment and, therefore, must have twelve months of verified abstinence before the license can be granted. In such a case, granting the license under the variance provisions of Minn. Rule 9502.0335, subp. 5 would be appropriate. Such a provisional should be granted for a period of one year on a condition that Applicant and her husband undergo family counseling and evaluation to determine whether any further treatment is necessary for Mr. Gertken's chemical dependency and, if so, completion of that treatment.

Based upon the foregoing Conclusions the Administrative Law Judge makes the following:

#### RECOMMENDATION

It is respectfully recommended that the Commissioner's proposed denial of the application of Gail M. Gertken for a family day care license be reversed and that the license be granted. It is further recommended, that if the

Commissioner determines that Applicant is disqualified under the provisions of Minn. Rules pt. 9502.0335, subp. 6A, that a provisional license be granted upon condition that Mr. Gertken complete a further evaluation of his chemical dependency and comply with any further requirement for treatment or abstinence determined by such evaluation.

Dated this 12th day of January, 1990.

STEVE M. MIHALCHICK  
Administrative Law Judge

#### NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped not transcribed, tape no. 8286

#### MEMORANDUM

Minn. Rule 9502.0335, subp. 6 provides:

Disqualification factors. An applicant or provider shall not be issued a license or the license shall be revoke, not renewed, or suspended if the applicant, provider, or any other person living in the day care residence or present during the hours children are in care, or working with children:

A. Abuses prescription drugs or uses controlled substances as specified in Minnesota Statutes, chapter 152, or alcohol, to the extent that the use or abuse has or may have a negative effect on the ability of the provider to give care or is apparent during the hours children are in care. Caregivers who have abused prescription drugs or have been dependent on controlled substances as specified in Minnesota Statutes, chapter 152, or alcohol, such that the use, abuse, or dependency has had a negative effect on the ability to give care, was apparent during the hours children are in care, or required treatment or therapy, must have 12 months of verified abstinence before licensure.



In this case, the Local Agency apparently read the rule as requiring all adults present in the home when children are in care who are chemically dependent and have required treatment or therapy to demonstrate twelve months of abstinence prior to licensure. But an examination of the rule makes it clear that that is not the case. That stricter provision is applied only to "caregivers". If it had been meant to apply to other persons living in the residence or present when children were in care it would have said "such persons" instead of "caregivers". By way of comparison, under the rules for foster family home licenses, Minn. Rules 9545.0090, the requirement for twelve months of abstinence by a chemically dependent individual does apply to all persons living in the household. Under those rules, the more strict standard applies, presumably because of the longer period of exposure to such persons and greater vulnerability of children living in the home around the clock. The term "caregivers" has a specific meaning and is separately defined under Minn. Rules pt. 9502.0315, subp. 6. It means the provider, substitute, helper or another adult giving care in the residence. The terms "provider" and "helper" clearly don't apply to Mr. Gertken. The term "substitute" means an adult who assumes the responsibility of the provider as specified in part 9502.0365, subpart 5. That provision requires the licensed provider to be the primary provider of care in the residence and requires that the children in care must be supervised by a caregiver. In this case, Applicant is the provider giving the care in the residence and supervising the children. Mr. Gertken is involved because he is sometimes present and has some interaction with the children. Since he recently became the night supervisor at his work, he will, apparently, be present in the house during the day more often while care is being provided. Nonetheless, it appears that his contact with the children is occasional and sporadic and not a designed part of the care. Therefore, he is not a "caregiver" for the purposes of the rule. Thus, Applicant is not disqualified for a license unless Mr. Gertken's use of controlled substances and alcohol has had or may have a negative effect on his wife's ability to give care or has been or will be apparent during the hours children are in the care. The Applicant has proved by a preponderance of the evidence that that is not the case.

Even if Mr. Gertken were considered a caregiver, it would be appropriate to issue a provisional license under Minn. Rules pt. 9502.0335, subp. 5, because to do so would not threaten the health, rights or safety of the children. If made conditional along the lines suggested by, Ms. Webb, it would allow time for Mr. Gertken to determine whether further treatment or therapy is

needed for his degree of chemical dependency, and for applicant to demonstrate that it has no affect on the care she provides.

S.M.M.